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No. 80-1641

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE SUPREME COURT OF VIRGINIA
and
LAWRENCE W. I'ANSON,
IN HIS OFFICIAL CAPACITY
AS CHIEF JUSTICE OF THE SUPREME COURT OF VIRGINIA,
Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
and
VIRGINIA CITIZENS CONSUMER COUNCIL,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

---

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM OR DISMISS

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Appellees have moved this Court pursuant to Rule 16, Rules of the Supreme Court of the United States, to affirm the judgment of the District Court dated January 8, 1981, or dismiss the appeal. This brief is filed in opposition to the motion.

I. The Question Presented by This Appeal Is Substantial

Rule 16 permits a summary affirmance where "the questions on which the decision of the cause depends are so

unsubstantial as not to need further argument." Appellees argue at page 5 of their motion that they prevailed against the Virginia Court in its direct enforcement role, that the District Court has now made an award of fees against the Virginia Court based not upon the Virginia Court's legislative acts, for which it enjoys absolute immunity, but upon its direct enforcement role, and that therefore there is nothing further to appeal. Therefore, they say, summary treatment of this appeal is warranted now.

But if that analysis is correct then there was no reason for this Court to remand for further proceedings; it could simply have told the District Court to fix attorneys' fees. The error of the District Court in its original decision was to fix attorneys' fees against the Virginia Court because of that Court's legislative role. It does not correct that error simply for the District Court to say, in effect, that it was only guilty of misdescription of the Virginia Court's activities as legislative rather than as enforcement when it awarded attorneys' fees after the original trial. Instead the District Court had a duty to make an independent inquiry to determine whether in fact the Virginia Court ever acted in an enforcement role, an endeavor the District Court did not undertake. It is therefore premature and unwarranted to ask this Court to grant summary affirmance or dismissal without giving the Virginia Court the opportunity on appeal, first to the United States Court of Appeals for the Fourth Circuit and then to this Court, to point out how the District Court has erroneously applied this Court's mandate.

Summary disposition of this appeal is also inappropriate because the appeal raises fundamental questions of comity and federalism between the judicial branches of government and will necessarily have a far reaching impact on the construction of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, and the scope of the immunities afforded the highest judicial officers of the State.

In its first full consideration by this Court, the issue whether the Virginia Court and its Chief Justice, in his official capacity, are immune for acts performed in their legislative capacity was squarely addressed. The Court concluded that an award of attorneys fees could not be based upon the Virginia

Court's mere promulgation of or failure to amend the Virginia Code of Professional Responsibility. Because the Virginia Court is cloaked with immunity from suit for legislative acts, the District Court's discretion in allowing fees may not be guided "by considerations centering on the exercise or nonexercise of the state court's legislative powers." *Supreme Court of Virginia* v. *Consumers Union of the United States,* 446 U.S. 719, 739 (1980). Since the award "was premised on acts or omissions for which appellants enjoyed absolute legislative immunity," this Court vacated the award and remanded to the District Court for further proceedings. 446 U.S. at 738.

Notwithstanding this Court's remand to the District Court, the only purpose of which could have been for the District Court to consider the Virginia Court's "direct enforcement role," the District Court failed to expand the record in any way and reinstated its earlier award of attorneys' fees against the Virginia Court and its Chief Justice in his official capacity. *Consumers Union of United States, Inc.* v. *American Bar Association,* 505 F. Supp. 822 (E.D. Va. 1981). The District Court made no finding that the Virginia Court had acted in its enforcement capacity. Indeed, the plaintiffs "never alleged nor proved in this case that the Virginia Court had a direct enforcement role . . ." 505 F. Supp. at 828 (Warriner, J., dissenting). In short, the District Court abused its discretion by perpetuating its award of attorneys' fees which, because no new evidence was taken, inevitably was based on conduct for which the Virginia Court is absolutely immune. In addition, even if, contrary to the record, there were evidence that the Virginia Court exercised its enforcement authority, the District Court should have refrained from awarding attorneys' fees because "special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968).

Had this Court desired the result it has now obtained on remand—an opinion with new labels but no new facts—then in its consideration of the record before it, this Court would have followed "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although

the lower court relied upon a wrong ground or gave a wrong reason.'" *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937). But instead of affirming on the ground that the Virginia Court and its Chief Justice were liable for attorneys' fees in their enforcement capacity, the Court vacated and remanded for further proceedings.

The award of attorneys' fees in this case against the Virginia Court therefore has not been predicated upon any facts for which it may be liable. Since the District Court's decision abrogates the immunities long recognized by this Court and failed to adhere to the proper standard governing awards of attorneys' fees pursuant to 42 U.S.C. § 1988, substantial questions warranting the Court's plenary consideration are raised.

II. Dismissal Of The Appeal Would Undermine This Court's Powers To Correct The District Court's Failure To Follow Its Mandate

Appellees have moved the Court alternatively to dismiss the appeal on grounds that the Court lacks jurisdiction. Plainly, the Court has jurisdiction to consider this appeal either pursuant to 28 U.S.C. § 1253 or pursuant to its inherent powers to correct the District Court's failure to follow this Court's mandate. *Vendo* v. *Lektro-Vend Corp.*, 434 U.S. 424 (1978).

Appellees contend that the Court's jurisdiction to correct mistakes in following this Court's mandate is not properly invoked here because this Court has already explicitly approved an award of attorneys' fees based on the Virginia Court's direct enforcement role. But had this Court intended to approve the award based on the record before it, the Court would simply have affirmed, citing the rule in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

The Virginia Court and its Chief Justice have filed a motion to defer consideration of this appeal pending the decision of the United States Court of Appeals for the Fourth Circuit. The motion was based upon the clearly enunciated

policy of discouraging direct appeals to this Court which can be pursued in the courts of appeals. Therefore, appellants, the Virginia Court and its Chief Justice, respectfully urge the Court to defer consideration of this appeal pending the decision of the Court of Appeals.

Respectfully submitted,

THE SUPREME COURT OF VIRGINIA
and THE HONORABLE
LAWRENCE W. I'ANSON
its Chief Justice,
Appellants

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CERTIFICATE

I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States, and counsel for the Supreme Court of Virginia and the Chief Justice, hereby certify that three copies of the foregoing have been served upon each counsel of record for the parties herein by mailing same first-class postage prepaid, this the 7th day of May, 1981, as follows:

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All parties required to be served have been served.

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